IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 2451 OF 2006

Kanga and Company. ...Petitioner.

V/s.

State of Maharashtra & Ors. ... Respondents.

Mr. S.K. Talsania, Senior Advocate with Avinash Jalisatgi i/b Thakore Jariwala and Associates for the Petitioner.

Dr. Virendra V. Tulzapurkar with Soumya Srikrishna i/b. Shaunak Satpute and Company for Respondent Nos.5.

Mr. V.P. Vaidya, Amicus Curiae.

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CORAM : DR. D.Y. CHANDRACHUD,J.

13TH OCTOBER, 2006.

P.C. :

1. Rule, by Consent of Counsel returnable forthwith.

Counsel appearing on behalf of the Respondents waive service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The Petitioner is a partnership firm of Advocates and Solicitors, consisting of fourteen partners. The 4th Respondent was engaged as a driver in 1991: according to the Petitioner, the 4th Respondent was engaged by the 5th Respondent in his personal capacity. The Petitioner has further averred that the 4th Respondent was driving vehicles belonging to the 5th Respondent and to the

members of his family and his salary as well as other benefits were determined and paid by the 5th Respondent. There was, according to the Petitioner no employer employee relationship or any privity of contract between the Petitioner and the 4th Respondent. The 4th Respondent is alleged to have taken a loan of Rs.20,000/- from the 5th Respondent, in connection with which, a promissory note was executed on 27th March 2002 acknowledging that the 5th Respondent was his employer and authorising the employer to deduct an amount of Rs.1,000/- per month from his salary. The Petitioner has stated before the Court that the Firm employs about 64 employees besides Advocates, Solicitors and Associates; that the firm maintains statutory records such as Wage Registers and that all employees of the firm, since many years, have been members of the Mumbai Mazdoor Sabha, a trade union registered under the Trade Unions Act, 1926. The Petitioner has averred that settlements or agreements have been entered into by the said Union in respect of the general conditions of service of the employees. The 4th Respondent was never, it has been stated, a member of the Mumbai Mazdoor Sabha nor has he obtained the benefit of any settlement signed between the Petitioner and the said Union.

3. The services of the 4th Respondent were terminated by the 5th Respondent on 16th June 2004 allegedly on the ground that while he was under the influence of alcohol,

the 4th Respondent had driven the car into a road divider railing. The 4th Respondent moved the Conciliation Officer and a notice was issued to the Petitioner on 18th October 2004. In his demand, made before the Conciliation Officer, the 4th Respondent claimed to be an employee of the Firm. It may be noted that the notice of demand dated 13th August 2004 is addressed to the Firm describing it as a proprietory concern of the 5th Respondent. By a letter dated 10th December 2004, the Petitioner placed on record its response in the conciliation proceedings and recorded that the 4th Respondent had failed to furnish any documentary evidence whatsoever to substantiate his allegation that he was in the employment of the Firm. The letter recorded that the 4th Respondent was engaged personally by the 5th Respondent who is a partner of the firm as a driver and that he was only driving the personal vehicle of the 5th Respondent. A reference was made to the fact that the 4th Respondent had borrowed some money which he had failed to pay. The Petitioner recorded that the 4th Respondent had not produced any salary statement, a letter of appointment or provident fund statement. There was according to the Petitioner no documentary evidence showing that the fourth Respondent was a member of the Mumbai mazdoor Sabha which is a recognized union of the employees of the Firm.

4. The Conciliation Officer submitted his report under Section 12(4) of the Industrial Disputes Act, 1947 on 14th

March 2005. Thereafter, the Deputy Commissioner of Labour by an order dated 10th August 2006 referred the dispute to adjudication in exercise of powers conferred by Section 12(5) of the Industrial Disputes Act, 1947.

5. These proceedings have been instituted inter-alia in order to challenge the order of reference made under Section 12(4), to adjudication.

6. On behalf of the Petitioner it has been submitted that the power of the appropriate Government to refer a dispute to adjudication must be exercised upon due application of mind to the question as to whether an industrial dispute exists or is apprehended. In the present case it was submitted that the 4th Respondent has not produced any evidence or material to indicate that he was an employee of the Petitioner. Some of the circumstances to which a reference has been made in the letter dated 2nd December 2004 of the Petitioner have been placed before the Court for consideration and it has been urged that the name of the 4th Respondent is not brought on the Wage Register, muster or any statutory records maintained by the Firm in the ordinary course of business. In these circumstances, it was submitted that the order of reference that has been passed by the Appropriate Government was passed mechanically without application of mind and should be quashed and set aside.

7. Notice was issued in the Petition on 4th October 2006 for hearing and final disposal, at the stage of admission. The 4th Respondent appeared in person. In order to enable the Court to be assisted, Shri V.P. Vaidya, Counsel practising in this Court was appointed as amicus curiae.

8. The power of the appropriate Government to make a reference under Section 12(5) of the Industrial Disputes Act, 1947 arises upon a report submitted by the Conciliation Officer under Section 12(4). Under sub-Section 1 of Section 12, the Conciliation Officer is obligated to hold conciliation proceedings where an Industrial Dispute exists or is apprehended. Under sub-Section 2 of Section 12 the Conciliation Officer has to endeavour to bring about a settlement of the dispute and if any settlement is arrived at, a memorandum of settlement together with the report thereon is to be submitted to the appropriate Government under sub-Section 3. In the event that no settlement is arrived at, a report is to be submitted to the Appropriate Government under Sub-Section 4 of Section 12. The Conciliation Officer has to state what steps were taken by him for ascertaining the circumstances and facts relating to the dispute and for bringing about a settlement thereof. In other words, an enquiry by the Conciliation Officer into

the facts and circumstances relating to the dispute meaning thereby, the Industrial Dispute is necessitated by the provisions of Section 12 of the Industrial Disputes Act, 1947. Proceedings before the Conciliation Officer are in fact initiated upon an Industrial dispute being in existence or being apprehended. The Appropriate Government is empowered to make a reference to adjudication if on a consideration of the record submitted under sub-Section 4 of Section 12, it is satisfied that there is a case for a reference inter-alia to the Labour Court or Tribunal.

9. The Jurisdiction of the Appropriate government under Section 12(5) came up for the consideration of the Supreme Court in **State of Bombay V/s. K.P. Krishnan** AIR 1960 Supreme Court 1223 Mr. Justice P.B. Gajendragadkar (as the learned Chief Justice then was), speaking for a Bench of five Hon'ble Judges of the Supreme Court held thus :-

> " There is no doubt that having regard to the background furnished by the earlier provisions of Section 12 the appropriate Government would naturally consider the report very carefully and treat it as furnishing the relevant material which would enable it to decide whether a case for reference has been made or not; but the words of Section 12(5) do not suggest that the report is the only material on which Government must base its conclusion. It would be open to the Government to consider other relevant facts which may come to its notice, and it is in the light of all these relevant facts that it has to come to its decision whether a reference should be made or not. The problem which the Government has to

> consider while acting under Section 12(5) (a) is whether there is a case for reference. This expression means that Government must first consider whether a prima facie case for reference has been made on the merits. If the Government comes to the conclusion that a prima facie case for reference has been made then it would be open to the Government also to consider whether there are any other relevant or material facts which would justify its refusal to make a reference. The question as to whether a case for reference has been made out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of a case as well as on the incidental question as to whether a reference should nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the government by Section 10(1) could be exercised by the Government even in dealing with cases under Section 12(5) provided of course the said discretion is exercised bona fide, its final decision is based on a consideration of relevant facts and circumstances, and the second part of Section 12(5) is complied with."

10. The duty of the appropriate Government therefore, as the Supreme Court holds, is to consider the Conciliation report carefully and treat it as furnishing relevant material which would enable the government to decide whether a case for making a reference is made out. It is open to the Government to consider other relevant facts which may come to its knowledge and which may be brought to its notice. The Government has to decide whether a prima facie case for a reference is made out on merits and then to consider whether any other relevant or material facts would justify a reference to adjudication. Undoubtedly, at the stage when the appropriate Government decides whether to refer the matter to adjudication, it is neither appropriate nor proper for the Government to

launch into a detailed evaluation of the merits of the claim. However, this does not preclude the Government from considering prima facie as to whether an Industrial Dispute exists or is apprehended. On the contrary, the law laid down by the Supreme Court should warrant a prima facie consideration. The same view which was expressed in **K.P.Krishnan's** case was reiterated in the subsequent Judgment of the Supreme Court in **M.P. Irrigation Karmachari Sangh V/s. State of M.P.** AIR 1985 S.C. 860 where the Supreme Court held thus :-

> " Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. Section 10 permits appropriate government to determine whether dispute 'exists or is apprehended' and then refer it for adjudication on merits."

11. Finally, it would be necessary to advert to the Judgment in **National Engineering Industries V/s. State of Rajasthan** (2000) 1 Supreme Court Cases 371. While considering the ambit of the jurisdiction under Article 226 of the Constitution of India, where there is an allegation that there was no industrial dispute and none was apprehended, the Supreme Court observed thus :-

> " It will be thus seen that the High Court has jurisdiction to entertain a Writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in

> its writ jurisdiction. it is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference."

12. During the course of the hearing of these proceedings, it has been submitted before the Court that the Petitioner has 64 employees and the workmen have joined the Mumbai Mazdoor Sabha with which settlements under the Industrial Disputes Act, 1947 have been entered into from time to time. It has been submitted that the 4th Respondent was an employee of the 5th Respondent, who is a Partner, in his personal capacity; the 4th Respondent was engaged as a driver to drive the personal vehicles of the 5th Respondent and that even the promissory note executed by the 4th Respondent for repayment of the sum of Rs.20,000/- affirms this factual position. During the course of the hearing the Court has enquired with the learned Amicus Curiae as to whether there is material available with the 4th Respondent to atleast prima facie show the relationship of employer and employee with the Petitioner. On the instructions of the 4th Respondent, the Court has been informed that there is no such material. No the salary slip issued by the Petitioner or any material to indicate that the Petitioner has engaged the 4th Respondent as a driver is produced. The Petitioner had in fact placed the relevant facts in the course of conciliation proceedings inter-alia in its

letter dated 10th December 2004. The appropriate Government was under an obligation by virtue of the provisions of sub-Section 5 of Section 12 to apply its mind carefully to the question as to whether prima facie, an industrial dispute exists between the Petitioner and the 5th Respondent. On the facts as they stand it is impossible to come to the conclusion that any industrial dispute exists or is apprehended between the Petitioner and the 4th Respondent. There is absolutely no material to indicate that the 4th Respondent was an employee of the Petitioner. The order passed by the appropriate Government making a reference under Section 12(5) was passed mechanically without any application of mind whatsoever to the question as to whether a prima facie case for reference has been made out. The order passed by the appropriate Government is hence unsustainable. The jurisdiction of the Court under Article 226 of the Constitution of India in such matters is indeed limited and as the Supreme Court observed in **National Engineering Industries,** the limited nature of the jurisdiction is to examine whether a dispute exists or is apprehended; and whether the reference has been made after government applied its mind to the case. It is clear that the present case falls within an exceptional class of cases where the interference of this Court under Article 226 of the Constitution of India is warranted to quash an order of reference under Section 12.

13. In the circumstances, the Petition is allowed. Rule is made absolute by quashing and setting aside the order passed by the first Respondent making a reference to adjudication on 10th August 2006 (Exhibit N).

14. In the circumstances, however, there shall be no order as to costs.